APPENDIX.

2.

THE APPLICATION OF EQUITY RULE 27, FEDERAL RULES OF CIVIL PROCEDURE 23(b), WAS IN HARMONY WITH THE DECISIONS OF THIS COURT, AND OF THE MARYLAND COURT OF APPEALS.

Analysis of Authorities Cited by Applicants.

No analysis of the State citations is made. It is agreed that there is a conflict among the State courts as to the necessity that the plaintiff in a derivative suit must have been the owner of stock at the time of the transaction of which he complains. If the Federal rule requiring such ownership is procedural, it is applicable here and has uniformly been applied without exception. If it is substantive, the Maryland rule is in accord.

The Federal authorities and texts cited by Applicants may be classified as follows:

1. Those which directly apply the rule.

Venner v. Great Northern R. Co., 209 U. S. 24, 33-34.
Quincy v. Steel, 120 U. S. 241, 246.
Dimpfel v. Ohio, etc., R. Co., 110 U. S. 209, 210.
Venner v. Great Northern Ry. Co., 153 F. 408, 411, 418 (C. C. N. Y., 1907).
Hawes v. Contra Costa Water Co., 104 U. S. 450, 461.

2. Those in which compliance with the ownership provision of the rule is shown.

Doctor v. Harrington, 196 U. S. 579, 582.
Krouse v. Brevard Tannin Co., 249 F. 538, 542 (C. C. A. 4, 1918).
Kelly v. Dolan, 218 F. 966, 970 (D. C. Pa., 1914).

Price v. Union Land Co., 187 F. 886, 890 (C. C. A. 8, 1911).

Greer Inv. Co. v. Booth, 62 F. 2d 321 (C. C. A. 10, 1932); 52 F. 2d 857, 860 (D. C. Okla., 1931).

3. Those in which the existence and applicability of the Federal rule to Federal cases is recognized.

Seasongood, Stockholder Suing for Corporation, 21 Harv. L. Rev. 195, 200.

Sykes, Stockholders' Suits, 4 Md. L. Rev. 380, 384.

13 Fletcher, Cyclopedia of Corporations (Perm. ed.) sec. 5981.

4 Cook on Corporations (8 ed.) sec. 737.

4. Those which involved other portions of the rule—e. g., effort to obtain corporate action before bringing suit—where a suitable excuse may be offered.

Delaware & H. Co. v. Albany & S. R. Co., 213 U. S. 435, 445, 451-452.

Corbus v. Alaska Treadwell Gold Mining Co., 187 U. S. 455, 465.

Ogden v. Gilt Edge Consol. Mines Co., 225 F. 723, 728 (C. C. A. 8, 1915).

American Creosote Works v. Powell, 298 F. 417, 420 (C. C. A. 5, 1924).

Greer Inv. Co. v. Booth, 62 F. 2d 321, 324 (C. C. A. 10, 1932).

5. Removal cases, holding that where removal is made solely on the ground that a federal question is involved, it is not necessary to show ownership at the time of the transaction of which complaint is made.

Hand v. Kansas City Southern Ry. Co., 55 F. 712, 714 (D. C. N. Y., 1931).

Jablow v. Agnew, 30 F. Supp. 718, 719 (D. C. N. Y., 1940).

6. Cases removed, other than on the ground of a federal question, holding it necessary that ownership at the time of the transaction complained of be alleged.

Jacobson v. General Motors Corporation, 22 F. Supp. 255, 257, 258 (D. C. N. Y., 1938).
Hitchings v. Cobalt Central Mines Co., 189 F. 241, 243 (C. C. N. Y., 1910).
Venner v. Great Northern Ry. Co., 153 F. 408, 418 (C. C. N. Y., 1907).

7. Cases holding that in a bill based on a federal question, allegations of non-collusion and effort to secure action are not necessary.

Ball v. Rutland R. Co., 93 F. 513, 515 (C. C. Vt., 1899).
Lindsley v. Natural Carbonic Gas Co., 162 F. 954, 957 (C. C. N. Y., 1908).

8. The Maryland cases.

Matthews v. Headley Chocolate Co., 130 Md. 523, has been adequately summarized in the Brief, pp. 8-9. The law review article in 4 Md. L. Rev. 380 discusses the divergent State court cases, recognizes that Rule 23(b) is binding on the Federal courts (p. 384), but states it as the "writer's conviction" that the Maryland Court of Appeals in the *Matthews* case did not intend to adopt the Federal rule but was only "following the well recognized principle of estoppel and the principle that the vendee acquires no greater right than those possessed by his vendor." (p. 389)

It would seem to require something more than the "conviction" of a recent law school graduate to overcome the summary statement of Maryland law, reached after an analysis of the conflicting State decisions, that (130 Md. at p. 534):

> "If this was a suit by stockholders, it would seem to us clear that holders of the stock who become such after the transactions complained of took place, should not be permitted to recover against the directors. * * *"*

The cases of *Eshleman v. Keenan*, 187 A. 25 (Del. Ch. 1936) and *Keenan v. Eshleman*, 2 A. 2d 904 (Del. 1938) are cited (Applicants' Brief, p. 22) as holding that the *Matthews* case "was peculiar and that its decision was limited as above stated." These decisions discussed (187 A., at p. 29; 2 A. 2d, at pp. 911, 912) *only* the form of relief proposed by the Court, permitting a recovery payable directly to such stockholders as were not individually barred.

The earlier case of *Tompkins v. Sperry, Jones & Co.*, 96 Md. 560, not mentioned in the Maryland Law Review article, had previously by way of dictum anticipated the *Matthews* decision. The Court said (pp. 583-584):

> "* * * In fact, the bill does not allege that any of the present bond or stock holders were the original holders of those securities or that they received them from the defendants or from either of them. Such an allegation has in several cases been held to be necessary to enable a receiver to maintain a suit of this character even when it is free from the other objections existing in the present case. *Dimpfel v. O. & M. R. Co.*, 110 U. S. 209-10; *Robinson v. W. V. Loan Co.*, 90 F. R. 770-2."

As pointed out in the Brief, pp. 8, 9, the *Matthews* case is direct authority that transferees from alleged

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*Peterson v. Hopson, 29 N.E.2d 140 (Mass. 1940), relied on by Applicants (Brief, pp. 22-23) definitely classified Maryland as denying recovery to post-transaction stockholders (29 N. E. 2d at p. 149).

wrongdoers cannot themselves complain of the alleged wrongs.

Surely the dictum in the *Tompkins* case, and the direct holding in the *Matthews* case, justified the Circuit Court of Appeals' conclusion (III, 9) that the "Maryland doctrine is in line with the rule" followed in the Federal courts.

9. Those recognizing that a transferee cannot complain of wrongs alleged to have been committed by a transferor.

Matthews v. Headley Chocolate Co., 130 Md. 523, 532-533, 535.

Seasongood, Stockholder Suing for Corporation, 21 Harv. L. Rev. 195, 197.

Sykes, Stockholders' Suit, 4 Md. L. Rev. 380, 383, 389.

10. Miscellaneous.

13 Fletcher, Cyclopedia of Corporations (Perm. ed.) sec. 5980, and

4 Cook on Corporations (8 ed.) sec. 736

merely cite State authorities holding that a plaintiff need not be a stockholder at the time of the transaction of which he complains. The Federal and State decisions to the contrary are cited in the next succeeding paragraph in each text.

2 Scott, The Law of Trusts, secs. 297A, 282.4, 294.2-295.1

have no ascertainable bearing. These sections deal with suits, notice, and "Various meanings of the term 'value' " in the case of conventional trusts.

3.

THE DECISION REQUIRING REPRESENTATION OF HOLDERS WHOSE SHARES ARE SOUGHT TO BE CANCELLED CORRECTLY APPLIED WELL-ESTABLISHED PRINCIPLES OF LAW.

Analysis of Authorities Cited by Applicants.

As pointed out in the Brief (pp. 14-15) none of the authorities cited by Applicants supports the argument that it was not necessary to join at least a representative group of holders of A shares whose stock the plaintiffs sought to have cancelled. The authorities cited either support the necessity for such joinder, or are not in point upon the question here involved. A further analysis of the cited cases follows:

1. Those which specifically required the joinder of a person whose property interest it was proposed to affect.

Weidenfeld v. Northern Pac. Ry. Co., 129 F. 305, 310-311 (C. C. A. 8, 1904).

Jellenik v. Huron Copper Mining Co., 177 U. S. 1, 8.

Christopher v. Brusselback, 302 U. S. 500, 504-505.

Carson v. Allegany Window Glass Co., 189 F. 791, 809 (C. C. Del., 1911).

2. Those in which all parties against whom relief was sought were actually made defendants.

Greenwood v. Union Freight R. R. Co., 105 U. S. 13.

Rogers v. Hill, 289 U. S. 582, 585-586.

Rogers v. Guaranty Trust Co., 288 U. S. 123, 127, 145, 146, 150.

Southern Pacific Co. v. Bogert, 250 U. S. 483, 487.

Jellenik v. Huron Copper Mining Co., 177 U. S. 1, 8, 14.

Hawes v. Contra Costa Water Co., 104 U. S. 461.

Coombes v. Getz, 285 U. S. 434.

Harvey v. Harvey, 290 F. 653, 657, 661 (C. C. A. 7, 1923).

Greer Inv. Co. v. Booth, 62 F. 2d 321, 324 (C. C. A. 10, 1932) affirming 52 F. 2d 857, 860.

3. Those in which the action was brought by the plaintiff on his own behalf only. In these cases the corporation affected was defendant, so that they could properly be placed in class 2 above. They are apparently cited without realization of this fact, but are in any event irrelevant. The decisions in the trial Court and the Circuit Court of Appeals did not question the right of Applicants to appear as plaintiffs. The decisions in the Courts below turned upon the necessity of joinder of *defendants*, whose property rights were to be affected.

In the following cases suit was brought by the plaintiff in his own behalf only.

Keller v. Wilson & Co., 180 A. 584, 585 (Del. Ch. 1935), 190 A. 115, 117, 125 (Del. Sup. 1936). (There is no foundation whatever for the statement on p. 24 of Applicants' Brief that the Court denied a motion to dismiss, "holding that the other shareholders affected were not indispensable parties and the plaintiff[s] could establish rights for other shareholders similarly situated." As pointed out in *Federal United Corporation v. Havender,* 11 A. 2d 331, 343 (Del. Sup. 1940) a change of rights affecting stockholders can be attacked only by diligent dissenters.)

Yoakam v. Providence Biltmore Hotel Co., 34 F. 2d 533, 535 (D. C. R. I., 1929).

Federal United Corporation v. Havender, 11 A. 2d 331, 333 (Del. Sup. 1940).

4. Those in which, in advance of contemplated corporate action affecting the rights of stockholders as such, injunctive relief was sought. In these cases the corporation was joined as a defendant, and no question of other proper parties, plaintiff or defendant, was involved.

Shanik v. White Sewing Mach. Corporation, 15 A. 2d 169 (Del. Ch. 1940).

Federal United Corporation v. Havender, 11 A. 2d 331 (Del. Sup. 1940).

Patterson v. Durham Hosiery Mills, 214 N. C. 806, 200 S. E. 906 (1939).

Tri-Continental Corporation, et al., v. The Chesapeake Corporation, et al., Circuit Court No. 2 of Baltimore City, The Daily Record, August 17, 1937.

Breslav v. N. Y. & Queens El. L. & P. Co., 273 N. Y. 593, affirming 249 App. Div. 181.

Yoakam v. Providence Biltmore Hotel Co., 34 F. 2d 533 (D. C. R. I., 1929).

General Investment Co. v. American Hide & Leather Co., 98 N. J. Eq. 326, 129 A. 244 (Err. & App. 1925).

Keller v. Wilson & Co., 180 A. 584 (Del. Ch. 1935), 190 A. 115 (Del. Sup. 1936).

Consolidated Film Industries, Inc. v. Johnson, 197 A. 489 (Del. Sup. 1937).

5. Cases holding that the corporation does not represent any class of stockholders in a controversy between different stockholders or different classes of stock.

Weidenfeld v. Northern Pac. Ry. Co., 129 F. 305, 311-312 (C. C. A. 8, 1904).

Harvey v. Harvey, 290 F. 653, 657 (C. C. A. 7, 1923).

6. Cases having no apparent bearing upon the necessity of joining as defendants those whose title to prop-

erty is sought to be affected. Groups 3 and 4 of this Analysis might properly be included here. The following additional cases cited by Applicants, and not otherwise listed above, definitely have no bearing upon the question of joinder of defendants.

Magruder v. Drury, 235 U. S. 106—Residence of decedent; accounting by trustees.

Looker v. Maynard, 179 U. S. 46—Quo warranto—right of legislature subsequently to provide for cumulative voting, recognized.

Miller v. New York, 82 U. S. 478—Quo warranto—right of legislature to change number of directors to be elected by designated stockholder, recognized.

Doan v. Consolidated-Progressive Oil Corporation, 271 F. 12 (D. C. Del. 1920)—In claimed class suit, for purpose of determining diversity of citizenship, members of a class not joining in the complaint are not treated as plaintiffs.

Barclay v. Wabash Ry. Co., 30 F. 2d 260 (C. C. A. 2, 1929) (Rev'd., Wabash R. Co. v. Barclay, 280 U. S. 197)—Question of whether holders of non-cumulative preferred stock could later demand payment before dividends could be paid on common stock out of current earnings.

Commerce Trust Co. v. Chandler, 295 F. 241 (C. C. A. 1, 1924)—Receiver can question validity of mortgage not executed by required corporate action.

American Steel & Wire Co. v. Wire Drawers' etc., Unions, 90 F. 598 (C. C. Ohio, 1898)—Action to enjoin unincorporated associations on strike. Court refused to dismiss as to parties joined but not served, because there would be further opportunity for service.

4.

THE COURTS CORRECTLY LIMITED THE SCOPE OF DEPOSITIONS UNDER RULE OF CIVIL PROCEDURE 30(b).

Analysis of Authorities Cited by Applicants.

None of the cases cited by Applicants involves depositions, or a situation in which the Court had limited the scope of the complaint as originally filed, and was now confronted with the intention of plaintiffs to ignore the effect of such limitation. The cases cited fall within the following classifications.

1. Those which merely hold that a fiduciary cannot make a profit out of the trust estate.

Jackson v. Smith, 254 U. S. 586.
Jackson v. Ludeling, 88 U. S. 616.
Pollitz v. Wabash R. Co., 207 N. Y. 113.
Irving Trust Co. v. Deutsch, 73 F. 2d 121 (C. C. A. 2, 1934).
Tilden v. Barber, 268 F. 587 (D. C. N. J., 1920).
Commonwealth v. Reading Traction Co., 204 Pa. 151. This case also expressly decided that holders of stock were indispensable parties to a suit to cancel their shares.
Peterson v. Hopson, 29 N. E. 2d 140 (Mass. 1940).

2. Those which hold that the rule above stated is particularly applicable to the use of corporate funds for private purposes.

Backus v. Finkelstein, 23 F. 2d 357 (D. C. Minn., 1927).
Guth v. Loft, Inc., 5 A. 2d 503 (Del. Sup. 1939).
Bailey v. Jacobs, 325 Pa. 187.

3. Miscellaneous cases.

United States v. Kissel, 218 U. S. 601. Limitations to an indictment charging a continuing conspiracy must be raised by the general issue plea, not a plea in bar.

Butler v. Watkins, 80 U. S. 456. In an action in deceit, evidence of similar misrepresentations is relevant on the question of animus.

Attorney General v. Pelletier, 240 Mass. 264. On an information to remove a District Attorney, the Court may consider derelictions during a previous term of office.

New England Foundation Co. v. Reed, 209 Mass. 556. Mortgagee not found to have been associated with mortgagor's fraud on builder.

Lantin v. Goodnow, 207 Mass. 291. Liability through adoption, with knowledge, of fraudulent acts.

Big Spring Electric Co. v. Kitzmiller, 268 Pa. 34. Action for purchase price of bonds; inadequacy of consideration.

Sutton v. Sutton, 56 Md. 109. No such case in report cited, or listed in the Maryland Reports.

5.

THE DECISION UPHOLDING THE 1932 RECAPITALIZATION PROPERLY APPLIED THE APPLICABLE MARYLAND LAW.

Excerpts from Article 23, Maryland Code of Public General Laws (1939 edition):

The certificate of incorporation shall state:

"Sec. 4(e) The total amount of capital stock, if any, of the proposed corporation, and the number and par value of the shares; and the restrictions, if any, imposed upon the transfer of the shares. If the capital stock is to be classified under the power

hereinafter granted, the certificate of incorporation shall also set forth a description of each class, with the preferences, voting powers, restrictions and qualifications of each class and the number and par value of the shares of each class.

* * * * * *

"(g) Any provisions which may be desired for the purpose of defining, limiting and regulating the powers of the corporation, and of the directors and stockholders or any class of the stockholders; provided, such provisions are not contrary to the law of this State or inconsistent with any of the terms and limitations of this Article. Any provision which is hereinafter in this Article authorized to be made in the by-laws, may, if desired, be made in the certificate of incorporation."

"Sec. 23. * * * Notwithstanding any provision of law requiring any action to be taken or authorized by the affirmative vote of the holders of a majority or other designated proportion of the shares or of the shares of each class, or by the affirmative vote of a majority or other designated proportion of the members, or to be otherwise taken or authorized by vote of the stockholders or members of any corporation, such action shall be effective and valid if taken or authorized by such vote of its stockholders or members as may be required for such action by its charter; but in the case of corporations having capital stock, the requisite number of affirmative votes shall not in any case be less than a majority in number of the aggregate number of votes to which the holders of all of the shares (meaning thereby all of the shares of all classes in the aggregate) outstanding and entited to vote thereon, shall be entitled, except in cases in which the law authorizes such action to be taken or authorized by a less vote; * * *."

Amendments may be made to accomplish:

"Sec. 28. * * * The addition to or diminution of the corporate purposes and powers, or the substitution of other purposes and powers in whole or in part for those set forth in the charter; the changing of the corporate business; the changing of the corporate name; the changing of the location of the principal office; the increasing of the authorized capital stock by increasing the number of shares thereof and the classification, if desired, of such increase; the decreasing of the authorized but unissued capital stock by reducing the number of shares thereof; the changing of the number and/or par value of shares of the capital stock of any class thereof, provided that the total amount of outstanding stock is not thereby increased; the classification or reclassification of all or any part of the capital stock; and the making of any other amendment of the charter that may be desired, provided that such amendment shall contain only such provisions as it would be lawful or proper to insert in an original certificate of incorporation made at the time of making such amendment. No amendment of the charter of a corporation shall be valid which changes the terms of any of the outstanding stock by classification, reclassification or otherwise, in the absence of a reservation in the charter of the right to make such amendment, unless such change in the terms thereof shall have been authorized by the holders of all of such stock at the time outstanding, by vote at a meeting or in writing with or without a meeting; and in the case of any such change of terms of outstanding stock, the articles of amendment shall, in addition, to other matters required by law, affirmatively set forth that the holders of such stock have duly authorized such change of terms. The word 'terms' as used in this Section in reference to stock is intended to mean only the contract rights of the holders thereof as expressed in the charter and shall be so construed."

"Sec. 44. The charter may provide that shares of stock of any class shall be convertible into shares of stock of any other class upon such terms and conditions as may be therein stated * * *."

"Sec. 47 (2). * * * the board of directors may, by resolution, advise the stockholders to authorize the issuance of certain shares of stock of one or more classes * * * for a certain specified consideration, and call a meeting of the stockholders to take action thereon. The board of directors shall, by resolution, state its opinion of the actual value of any consideration other than money for which it advises that such stock * * * be issued. The meeting of stockholders shall be duly warned * * * and at such meeting, duly called and warned as aforesaid, the stockholders may, by the affirmative vote of two-thirds of the shares of each class of stock outstanding and entitled to vote thereon, authorize the issuance of all or any part of such stock * * * as advised by the board of directors.

"(3) The corporation shall prepare a statement in such form as may be prescribed or permitted by the State Tax Commission * * *."

Tri-Continental Corporation, et als. v. The Chesapeake Corporation, et al., in the Circuit Court No. 2 of Baltimore City (filed August 16, 1937).

(Extract from opinion reported in The Daily Record, Baltimore, August 17, 1937, page 3.)

DENNIS, C. J.—

* * *

"Sections 6 and 7 of the Charter define the rights of the stock and provide 'That no such powers (of directors and stockholders) shall be exercised to abrogate or alter any of the terms of the outstanding Series A Preferred Stock.' Sec. 28 of Art. 23 of the Code of Public General Laws in force in 1929 when

the Alleghany Corporation was organized, provided then, and now, in effect that no amendment of the charter of a corporation shall be valid which changes terms of any outstanding stock without its consent, and by 'terms' is meant the contract rights of the holders as expressed in the charter. Sec. 33 of the Act then in force applied to consolidations the identical provisions found in the Sec. 28 relating to amendments. Therefore it is clear that by contract and statute the minority holders of Class A Preferred Stock, since the consolidation plan alters their existing contract rights, cannot lawfully be required either to trade their stock in accordance to 'the plan' against their will, or to protest and have it appraised."

* * *

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 476.

BRYANT McQUILLEN, ET AL.,
Petitioners,

v.

THE NATIONAL CASH REGISTER COMPANY, ET AL.,
Respondents.

ANSWER OF THE NATIONAL CASH REGISTER COMPANY TO MOTION AS TO RECORD FOR APPLICATION FOR WRIT OF CERTIORARI.

The motion of Applicants requests that the certified record on appeal from the District Court for the District of Maryland, the record of proceedings in the Circuit Court of Appeals for the Fourth Circuit, Applicants' and Respondents' printed appendices filed in the Circuit Court of Appeals, copies of (extracts from) annual reports of this Respondent, "and such other records, papers and proceedings [not described] as were sent here by the C. C. A. (4) shall be considered as the record for the determination by this court of their application."

Since this constitutes the entire record, with partial duplications, this Respondent has no objection to it being considered as the record.

This Respondent wishes to point out, however, that the record as so constituted has not been printed as required by Rule 38 of this Court. Rule 10(1) of the Circuit Court of Appeals, Fourth Circuit, provides that unless ordered by the court, it shall not be necessary to print the record on appeal from a District Court. The record was not printed for the use of the Court below, although certain portions were printed as appendices to the briefs. The Applicants completely ignored the requirements of Rule 10 of the Circuit Court of Appeals. They did not print the Findings of Fact, Conclusions of Law, or Judgment of the trial Court. They omitted a portion of the opinion of the trial Court on the merits. They did not indicate omissions in the testimony (pp. 131, 134, 148 (three instances), 176, 186, 187, 194, 199, 227, 255, 256, 268, 275). Transpositions occur of pages 288-291. Reference to the pages of the transcript are not given.

This Respondent repeatedly expressed its willingness to attempt to stipulate what portions of the complete record should be printed under Rule 38(8) of this Court. The Applicants have insisted that they were not required to print anything other than the proceedings in the Circuit Court of Appeals.

This Respondent has been served only with Volume III of the Transcript, consisting of the proceedings in the Circuit Court of Appeals, and the extensions of time granted by this Court; and extracts from certain of the Annual Reports. It was showed, but not served with, two other printed volumes, not entitled in this

Court. These consisted of the *Brief and* Appendix of Appellants in the Circuit Court of Appeals, and of the Appendix filed on behalf of all Appellees in that Court. From an examination of Appellants' Appendix it appeared that none of the errors and omissions above mentioned had been corrected, although all of them had been called to the attention of Applicants.

It is submitted that while a proper record was transmitted to this Court, no proper printed record has been prepared, and no proper service has been made upon this Respondent.

Respectfully submitted,

JAMES PIPER,
Counsel for Respondent,
The National Cash Register Company.

R. DORSEY WATKINS,
CHAUNCEY B. GARVER,
Of Counsel.

In the Supreme Court of the United States

OCTOBER TERM, 1940.

No. 476.

BRYANT MCQUILLEN AND SAMUEL GOTTLIEB,
PETITIONERS,

v.

THE NATIONAL CASH REGISTER COMPANY, DILLON READ & COMPANY, FREDERICK B. PATTERSON, ET AL.

ANSWER OF EZRA M. KUHNS, S. C. ALLYN, WILLIAM HARTMAN, J. H. BARRINGER AND EDWARD A. DEEDS TO MOTION AS TO RECORD FOR APPLICATION FOR WRIT OF CERTIORARI.

The motion of Applicants requests that the certified record on appeal from the District Court for the District of Maryland, the record of proceedings in the Circuit Court of Appeals for the Fourth Circuit, Applicants' and Respondents' printed appendices filed in the Circuit Court of Appeals, copies of (extracts from) annual reports of this Respondent "and such other records, papers and proceedings [not described] as were sent here by the C. C. A. (4) shall be considered as the record for the determination by this court of their application." Since this constitutes the entire record, with partial du-

plications, these Respondents have no objection to it being considered as the record.

These Respondents wish to point out, however, that the record as so constituted has not been printed as required by Rule 38 of this Court. Rule 10 (1) of the Circuit Court of Appeals, Fourth Circuit, provides that unless ordered by the court, it shall not be necessary to print the record on appeal from a District Court. The record *was not printed for the use of the Court below,* although certain portions were printed as appendices to the briefs. The Applicants completely ignored the requirements of Rule 10 of the Circuit Court of Appeals. They did not print the Findings of Fact, Conclusions of Law, or Judgment of the trial Court. They omitted a portion of the opinion of the trial Court on the merits. They did not indicate omissions in the testimony (pp. 131, 134, 148 (three instances), 176, 186, 187, 194, 199, 227, 255, 256, 268, 275. Transpositions occur of pages 288-291). Reference to the pages of the transcript are not given.

These Respondents repeatedly expressed their willingness to attempt to stipulate what portions of the complete record should be printed under Rule 38 (8) of this Court. The Applicants have insisted that they were not required to print anything other than the proceedings in the Circuit Court of Appeals. This is a complete misunderstanding of the meaning of Rule 10 of the Circuit Court of Appeals which was intended to relieve litigants from the burden of printing the record. This beneficent purpose would be defeated if this Court were to rule that only such portions of the record as were printed in the briefs filed in the Court below, could be considered on petition for the writ of certiorari.

These Respondents have been served with Volume III of the Transcript, consisting of the proceedings in the Circuit Court of Appeals, and the extensions of time granted by this Court, with mimeographed extracts of the annual reports of the Company and with two other printed volumes, not entitled in this Court. These latter consisted of the *Brief and* Appendix of Appellants in the Circuit Court of Appeals, and of the Appendix filed on behalf of all appellees in that Court. From the examination of Appellants' Appendix it appeared that none of the errors and omissions above mentioned had been corrected, although all of them had been called to the attention of Applicants.

It is submitted that while a proper record was transmitted to this Court, no proper printed record has been prepared, and no proper service has been made upon these Respondents. Clearly, this is not a compliance with the rules of this Court. These Respondents accordingly reserve the right to insist upon such compliance in the event that the writ of certiorari should be granted.

Respectfully submitted,

WILLIAM L. MARBURY, JR.,
Counsel Appearing Specially
for Ezra M. Kuhns, et al.

No. 476

In the Supreme Court of the United States

OCTOBER TERM, 1940.

BRYANT McQUILLEN AND SAMUEL GOTTLIEB,
PETITIONERS,

v.

THE NATIONAL CASH REGISTER COMPANY, DILLON READ & COMPANY, FREDERICK B. PATTERSON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

MEMORANDUM OF EZRA M. KUHNS, S. C. ALLYN, WILLIAM HARTMAN, J. H. BARRINGER AND EDWARD A. DEEDS, IN OPPOSITION.

WILLIAM L. MARBURY, JR.,
Counsel Appearing Specially for Ezra M. Kuhns, et al.

The Daily Record Co. Print, Baltimore.

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MEMORANDUM OF EZRA M. KUHNS, S. C. ALLYN, WILLIAM HARTMAN, J. H. BARRINGER AND EDWARD A. DEEDS, IN OPPOSITION.

This memorandum is filed by counsel appearing specially on behalf of Ezra M. Kuhns, S. C. Allyn, William Hartman, J. H. Barringer and Edward A. Deeds. Each of them is a non-resident of the District of Maryland upon whom substituted service under Section 57 of the Judicial Code (28 U. S. C. 118) was effected outside of the district. Each appeared in the trial court specially and solely for the purpose of moving the court

to limit proceedings under the amended bill of complaint to claims in rem against the stock of The National Cash Register Company. These motions having been granted, they then appeared specially and solely for the purpose of protecting their interest in the stock. After a trial on the merits, a judgment was entered finally dismissing the bill, and on appeal that judgment was affirmed. By filing this memorandum, these respondents do not intend to enter general appearances or to confer any jurisdiction over their persons.

OPINIONS BELOW.

The Opinion of the Circuit Court of Appeals filed on June 10, 1940, is printed in Vol. III of the transcript of the record at pages 3 to 14. (See also 112 Fed. (2d) 877). The District court filed four opinions. The first opinion, filed December 14, 1935, is not included in the record, but will be found reported in 13 F. Supp. 53. The second opinion, filed on July 14, 1936, is printed at pages 75 to 78 of the Appendix to the Plaintiff-Appellant's Brief in the Circuit Court of Appeals (hereinafter called "Appellant's Appendix"). The third opinion filed on March 17, 1938, is printed at pages 80 to 98 of Appellant's Appendix (See also 22 F. Supp. 867). The fourth opinion, filed May 4, 1939, is printed in part at pages 98 to 129 of Appellant's Appendix. The rest of the opinion is printed at pages 81 to 82 of the Appellee's Appendix filed in the Circuit Court of Appeals (See also 27 F. Supp. 639).

STATEMENT.

A. *The Proceedings Below.*

The suit is one brought by two individuals who are holders of 120 shares of stock of The National Cash Reg-

ister Company, a Maryland corporation, against that Company and certain other defendants, all of whom are non-residents of Maryland. The avowed purpose of the suit is to redress alleged wrongs suffered by the Company at the hands of the other defendants.

The original bill of complaint was filed in the District Court for the District of Maryland on July 5, 1934. After proceedings not material here, an amended bill was filed on February 5, 1935. After prolonged consideration, the trial court entered an order on January 7, 1936 for substituted service under Section 57 of the Judicial Code (28 U. S. C. 118) upon certain of the non-resident defendants, including these respondents. (Appellee's Appendix p. 1). The Court refused to order service on the other defendants on the ground that they were not alleged to own or to have any interest in the stock of the Company which was the only *res* claimed to be before the Court (there being no allegation that the Company or the non-resident defendants had any other assets or property within the District of Maryland). See 13 F. Supp. 53.

The Marshal's returns show that personal service was made outside of the district on Lee Warren James, Dillon Read & Company and on these respondents. The return further showed that service was made within the district on the Company. No personal service was made on any other defendant. (R. pp. 121-123,* Appellee's Appendix p. 3).

Lee Warren James and these respondents appeared specially and solely for the purpose of moving to quash

*The typewritten record certified to this Court pursuant to Rule 38, is referred to as "R. p. ".

the service of process made upon them. (R. pp. 126, 127, 128, 129, 130, 131). On February 21, 1936, an order was entered taking the decree *pro confesso* as to Dillon Read & Company, Frederick B. Patterson and C. E. Steffey (Appellee's Appendix p. 4), and on April 3, 1936 a final decree was entered as to the three above named defendants. (Appellee's Appendix p. 5). On June 11, 1936, Messrs. Patterson and Steffey appeared specially and solely for the purpose of moving to strike out the orders of February 21, 1936 and April 3, 1936 on the ground that they were nullities. (Appellee's Appendix p. 7). The petitioners thereupon moved the court to strike out the special appearances of Messrs. Patterson and Steffey and to declare them general appearances. (Appellee's Appendix p. 9).

On July 1, 1936 the court entered orders overruling the petitioners' motion to strike out the special appearances of Patterson and Steffey and rescinding the orders of February 21, 1936 and April 3, 1936, except as to Dillon Read & Company. (Appellee's Appendix pp. 11, 12). On the same day the court entered an order overruling the motions of Lee Warren James and of these respondents to quash service of process upon them. (R. p. 144).

Immediately thereafter Lee Warren James and these respondents, through counsel appearing specially and solely for that purpose, filed identical motions *(mutatis mutandis)* reading as follows: (R. pp. 175, 176, 177, 178, 179):

> "Appearing solely for the purpose of making this motion and not intending to submit himself to the jurisdiction of this court as a party hereto, comes now Lee Warren James, the defendant above named, and moves this court to limit further proceedings

> under the amended bill of complaint filed in this cause to such claims of the complainant as constitute actions in rem against the stock of The National Cash Register Company and to strike from said amended bill of complaint all other claims including all personal claims against this defendant, this being the first opportunity at which the defendant can make this motion."

On June 16, 1937 the court entered its order sustaining these motions. (Appellee's Appendix p. 13). As thus limited, the bill was confined to the following: (1) A claim for the cancellation of 400,000 "B" shares issued by the Company in 1926, and of the "C" or common shares issued in lieu thereof, (2) A claim for the cancellation of the "C" and/or common shares which were issued in lieu of the "B" shares as the result of a recapitalization of the Company in 1932, (3) A claim for the cancellation of the 238,000 "A" shares which were issued to the holders of the "A" shares as a result of the 1932 recapitalization, (4) A claim for a declaration that the option given to the defendant Deeds was null and void and for an injunction against the Company performing the same, (5) A claim for an injunction against the payment of any dividends on the "B" shares and the "C" or common shares issued in lieu thereof, on the 238,000 "A" shares and on the shares covered by the Deeds option.

On June 25, 1937, Lee Warren James and each of these respondents appeared specially and solely for the purpose of protecting any interest which he might have in stock of the Company having a situs within the District of Maryland, and moved the court to dismiss the amended bill of complaint as limited by the order of June 16, 1937,

because of defenses apparent on the face of the bill. (R. pp. 196, 201, 206, 211, 215). The Company filed a similar motion together with a motion for further and better statement. (R. pp. 192, 225).

In September 1937, petitioners filed a petition in the Circuit Court of Appeals for the Fourth Circuit for a rule directed to the district judge, requiring him to show cause why a writ of mandamus should not issue commanding him to set aside and vacate the orders passed by him on July 1, 1936, and June 16, 1937. This petition having been denied (93 F. (2d) 1009), a petition was filed in this Court for writs of certiorari, mandamus and prohibition to the Circuit Court of Appeals which were likewise denied. (303 U. S. 619, 637).

On June 30, 1938, the court entered an order dismissing certain parts of the bill of complaint as previously limited, and directing these respondents and the Company to plead to what was left of the amended bill of complaint within twenty days. (Appellees Appendix p. 19) The effect of this order was to limit the bill of complaint to the following: (1) a claim for the cancellation of the "C" and/or common shares which were issued in lieu of the "B" shares as the result of the 1932 recapitalization, (2) a claim for a declaration that the option given to Deeds was null and void and for an injunction against the Company performing the same, and (3) a claim for an injunction against the payment of any dividends on the "C" or common shares issued in lieu of the "B" shares and on the shares covered by the Deeds option.

Within the allotted time the Company, Lee Warren James, and each of these respondents filed their answers.

(R. pp. 297-401). Each of the answering individual defendants preserved his special appearance and limited his answer to the protection of property subject to the jurisdiction of the court.

On November 10, 1938 on motion of the Company, the trial court limited the scope of examination on depositions to be taken by the petitioners, to matters relating to the transactions dealt with in the amended bill of complaint as limited by its previous orders of June 16, 1937, and June 30, 1938. (Appellants Appendix p. 79).

The case came on for hearing in open court in January, 1939, at which time depositions were introduced in evidence and further testimony taken in open court. On July 13, 1939, the court filed its findings of fact, conclusions of law and judgment dismissing the entire bill of complaint. (Appellees Appendix pp. 82-96).

This memorandum will deal with the orders of July 1, 1936 and June 16, 1937 and with the judgment of July 13, 1939 insofar as that judgment relates to the Deeds option. All other questions affecting the interest of these respondents are sufficiently dealt with in the brief in opposition filed on behalf of the Company.

B. The Deeds Option.

The Deeds option is printed in the Appellants' Appendix at pp. 307-311. After certain recitals, it gave the respondent Deeds the right and option, during the five years commencing July 17, 1932 and ending July 17, 1937, to purchase at $9.80 a share (cost to the Company) with interest at the rate of 4% less dividends, from July 17, 1932 to the date of payment, all or any part of 50,000 shares of Class "A" common stock or a like num-

ber of shares of any class into which said stock might be converted. As to 10,000 shares, the option was exercisable immediately upon its execution. During the year beginning July 17, 1932 and in each of the three succeeding years, an additional 10,000 shares became subject to the option and it was expressly provided that the option should be cumulative. Subject to certain provisions not material here, it was provided that the option should become null and void at any time that Mr. Deeds should be neither an officer nor a director of the corporation.

A full statement of the circumstances surrounding the execution of this agreement will be found in the findings of the trial court. (Appellee's Appendix pp. 89-93). The conclusion was that "the option agreement was given to Deeds in good faith and did not constitute a waste of the Company's assets on the part of the directors in making such an agreement. In view of the qualifications, record and achievement of Deeds, the compensation paid to him did not constitute an abuse of discretion vested in the directors." (Appellee's Appendix p. 93).

The Circuit Court of Appeals, after reviewing the facts, concluded "that this option contract was lawful and proper and that it was based upon a sufficient consideration in the agreement by Colonel Deeds to assume the leadership, and to direct the policies of a great corporate enterprise." (Vol. III Transcript of Record, pp. 3-4).

ARGUMENT.

I.

THE ORDERS OF JULY 1, 1936.

As the petitioners do not contend that the affirmance of these orders presents any question justifying the granting of the writ of certiorari, we do not discuss them further.

II.

THE ORDER OF JUNE 16, 1937.

Petitioners urge review of the affirmance of this order for two reasons (a) because of alleged conflict with decisions of other courts and (b) because of the alleged importance of the questions presented.

(a) Upon examination of the cases cited by petitioners, it will be found that the alleged conflict is confined to a few *obiter* remarks in an opinion delivered by District Judge WOOLSEY. See *Bede Steamship Company v. New York Trust Company*, 54 F. (2d) 658. The claim of conflict with the other cases referred to by petitioners is palpably frivolous. The courts below followed and applied the only case directly in point, i.e. *Grable v. Killits*, 282 F. 185 *cert. den.* 260 U. S. 735.

(b) Undeniably it is of importance to protect litigants from being forced to defend suits *in personam* instituted in districts in which none of the parties are resident, under the guise of actions *in rem* against property having a *situs* within the district. This the order of the trial court effectively accomplished and its affirmance thus presents no question calling for the exercise by this court of its power of review.

III.

THE JUDGMENT UPHOLDING THE DEEDS OPTION.

The ruling of the courts below declining to set aside the option agreement between the Company and the respondent Deeds, is urged as a ground for granting the writ. Petitioners state that this ruling conflicts with applicable decisions of this court and of the Maryland Court of Appeals, as well as the weight of authority.

The contention is completely without foundation. The legal principles applied by the lower courts were of the hornbook type; nor do any of the cases cited by petitioners present any conflict in this respect. The issue is essentially one of fact and the petitioners have failed in any respect to impeach the comprehensive findings of the trial judge which were reviewed and fully concurred in by the Circuit Court of Appeals.

CONCLUSION.

Evaluation of the public importance of this litigation may be aided by consideration of the fact that after six years of litigation, no other of the nineteen odd thousand stockholders of the Company has chosen to associate himself with the petitioners in the prosecution of their claims. The petitioners have offered no intelligible reason why the writ of certiorari should be granted.

Respectfully submitted,

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